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82-474

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SAFEWAY STORES INCORPORATED,
Petitioner,

VS.

RONI K. DOGHERRA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Whether the making of a false statement during the investigation of a grievance should be held to constitute employer repudiation of the grievance procedures of a collective bargaining agreement where the person making the false statement was a member of the Union investigating the grievance and was not authorized by the employer as having authority to adjust grievances or otherwise participate in the grievance procedure; and where the making of the false statement caused the Union to drop the grievance?

2. Whether the employer should be held accountable for such a false statement where that statement was made by a member of the Union to which the statement was made and when the statement was made without the employer's knowledge, consent or authorization?

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[1]The caption of the case in this Court contains the names of all parties. Emphasis in matter quoted herein has been supplied.

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OCTOBER TERM, 1982

SAFEWAY STORES INCORPORATED,
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VS.

RONI K. DOGHERRA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in Roni K. Dogherra v. Safeway Stores Incorporated, Nos. 80-4178 and 81-4351 below.

OPINIONS BELOW

The opinion of the Court of Appeals filed June 21, 1982 is reported in ..... F.2d ..... and 110 L.R.R.M. 2790. A copy is printed as Appendix A. An order denying Safeway's Petition for Rehearing and Rehearing En Banc is printed as Appendix B. The District Court's "Order Denying Motions for Reconsideration and For Certification of Issue" and "Judgment and Findings of Fact and Conclusions of Law" are printed as Appendices C and D, respectively. The "Order Denying Motions for Reconsideration and For Certification of Issue" is reported at 484 F.Supp. 396.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals rendered its decision and filed its opinion on June 21, 1982 (APP. A). A timely Petition for Rehearing and Rehearing En Banc was denied (APP. B). The Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291 and 1294(1). The District Court had jurisdiction under 29 U.S.C. § 185 and 28 U.S.C. § 1331(a).

STATUTORY PROVISIONS

29 U.S.C. § 185 reads in relevant part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> . . . .
>
> (e) For the purposes of this Section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the quesion of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

STATEMENT OF THE CASE

This case arose under Section 301 of the Labor-Management Relations Act (hereinafter "Act" or "LMRA") (29 U.S.C. § 185). Originally filed in Superior Court in and for the County of Santa Cruz, California, the action was removed by Petition and Amended Petition for Removal on December 22 and 29, 1977. Essentially, the Plaintiff below, Dogherra, alleges that she was terminated wrongfully

from her job at Safeway. She claims that in December 1975 she was granted a six-month leave of absence and that a few days prior to the expiration of the leave she returned to the Safeway Store where she had been employed and informed Arthur Martinez, the Assistant Manager, and a member of the same Union and bargaining unit as Dogherra, of her readiness to return to work. Safeway contends that Martinez was authorized to receive Dogherra's notice of her intention to return to work because the Store Manager, a member of Safeway's management, was away when Dogherra claims she returned.

Dogherra claims that a few weeks later she was discharged from Safeway on the ground that she failed to return prior to expiration of her leave. Thereafter, she claims to have filed a grievance with her Union over the allegedly wrongful discharge. The nub of her case and of this appeal is her further claim that Martinez lied to the Union during its investigation of the grievance by telling the Union that Dogherra had not sought reemployment prior to the expiration of her leave. Dogherra claims that as a result of this lie, the Union dropped the grievance, leaving her without a remedy for the allegedly wrongful discharge.

After the Union dropped the grievance, Dogherra approached the President of her Union, Retail Clerks Union Local 839 (hereinafter "Union" or "Local 839") and asked him to reopen her grievance. The grievance was reopened in February 1977, and following an evidentiary hearing, Arbitrator Sam Kagel ruled that Dogherra's grievance was not arbitrable.[1] In so ruling, Arbitrator Kagel stated:

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[1]Arbitrator Kagel's "Opinion and Decision" is reprinted as Appendix E.

> It must be accepted that when there is a grievance and a Board of Adjustment meeting is requested and such request is granted and the Union then drops the case, it cannot then be resurrected some five months thereafter. Such a practice would be violative of the principle that is behind all provisions dealing with the adjustment of grievances; i.e., that they should be completed within a reasonable time, that the Employer have the right to rely on the withdrawal of the case. It must be found that Ms. Dogherra was, in fact, informed that the case was not proceeding and the reason therefor, namely, her defense and she had talked to Martinez did not check out and that she had not supplied the Union with the necessary medical release.

App. E, p. A-33.[3] The collective bargaining agreement between Safeway and Local 839 provides that decisions of an arbitrator "shall be final and binding upon" the parties.

Approximately a year after Arbitrator Kagel made his decision, Martinez changed his story and told Union officials that he earlier had lied to them about Dogherra. There was no evidence adduced at the trial that following this meeting the Union attempted again to revive Dogherra's grievance.

The complaint in state court joined as Defendants Safeway, the Union, the Retail Clerks International Association, AFL-CIO, and thirty fictitious parties. Dogherra al-

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[3]There was testimony, both at the trial and at the hearing on Dogherra's grievance, from Union officials that Dogherra had been asked to provide her doctor's medical release to the Union so they could present it at a Board of Adjustment hearing that had been scheduled respecting her grievance. Dogherra never provided the medical release.

leged that Safeway had breached its collective bargaining agreement in terminating her, that the Defendant Unions had breached the duty of fair representation in connection with the processing of her grievance, and that the parties had committed various torts under California law. By first amended complaint filed February 20, 1979, Dogherra dropped all Defendants other than Safeway, and her state claims thereafter were dismissed upon Safeway's motion. The sole remaining claim against Safeway was for breach of the collective bargaining agreement. No allegations were left pertaining to any alleged breach of the duty of fair representation on the part of Local 839.

Relying on the state of the record and settled law of the Ninth Circuit Court of Appeals, Safeway in April 1979 moved for summary judgment on the ground that the court could not reach the question whether Safeway had breached the collective bargaining agreement by discharging Dogherra. Safeway relied on what it considered to be Arbitrator Kagel's final and binding arbitration decision rejecting the grievance for lack of timeliness and argued that this disposition was not reviewable. Dogherra opposed this motion, relying principally on the allegation that Martinez had lied when the Union was investigating the grievance. She urged the court to find that the grievance and arbitration procedure thereby was subverted and to rule that she be permitted to bring her breach of contract claim on the merits in federal court, notwithstanding its disposition in the earlier arbitration.

Safeway's motion was denied, and the district court ruled that Martinez' alleged lie could be imputed to Safeway if it were later found at trial that Martinez was Safe-

way's agent at the time he allegedly lied. The court also ruled that such conduct could constitute at least an implied repudiation of the grievance procedure so that the court would have jurisdiction to hear Dogherra's claim on the merits (App. C, pp. A-18-20).

There was no evidence adduced at trial that Safeway ever had actual knowledge of Martinez' lying or that it authorized or ratified the lie. Martinez' sole explanation for his conduct was that he believed Safeway did not want Dogherra as its employee. Likewise, no evidence was adduced that Martinez ever was authorized to adjust grievances or participate in the grievance procedure on Safeway's behalf or that the Union believed him to be so authorized.

Following the trial, the court found that Martinez had lied to representatives of Local 839, thereby causing the Union to drop Dogherra's grievance, that Safeway was "acting through its management representative, Arthur Martinez," when Martinez lied, and that the telling of the lie had prevented the "contractual machinery" from operating "within the minimum level of integrity, that Congress had anticipated when it put its blessings on private dispute settlement arrangements. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976)" (App. D, p. A-24).

The district court ordered Dogherra reinstated and compensated with backpay and other lost fringe benefits. The court also found that Safeway had acted in bad faith in pursuing the litigation and ordered Safeway to pay all of Dogherra's attorneys' fees (*id.* at A-25).

Safeway appealed, arguing that the district court had erred in finding that Martinez' lie had repudiated the griev-

ance procedure and in finding that the lie should be imputed to Safeway.[4]

The Court of Appeals held that "intentionally giving a false statement to Union investigators causing them to drop the grievance until after it was time-barred . . . constitutes fraud" and that such conduct was a repudiation of the arbitral process (App. A, p. A-7). The Court of Appeals, however, remanded the fraud issue to the district court because the lower court did not decide whether the fraud had been discoverable prior to the arbitration and did not state whether the fraud had been proven by "clear and convincing" evidence (*id.* at A-7-8). The Court of Appeals also found that when Martinez lied he was Safeway's agent:

> The agency is not necessarily vitiated even if Safeway did not tell Martinez to lie nor know what Martinez told the union investigators. As noted above, even acts specifically forbidden by the principal may be within the scope of the agent's authority. . . . Martinez stated that he understood that Safeway did not want Dogherra as its employee. He felt that lying to the union investigators would help attain Safeway's goal. He intended to further Safeway's interests. His conduct is therefore chargeable to Safeway (*id.* at A-4-5).

We discuss the treatment of the case by the Court of Appeals in greater detail in our elaboration of the reasons for granting the Writ, to which we now turn.

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[4]Safeway also appealed the district court's award of attorneys' fees and finding that Safeway had acted in bad faith when it pursued the lawsuit. The district court was reversed on these issues. Safeway also appealed the district court's finding that Martinez' lie had caused the Union to drop the grievance. The district court was affirmed on this issue. Neither of these issues are presented here for review.

REASONS FOR GRANTING THE WRIT

A. This Is a Case of Nationwide Impact Because the Opinion of the Court of Appeals Will be Interpreted as Opening the Door to Numerous Challenges of Arbitral Awards, Contrary to Settled National Labor Policy

Ever since this Court decided the *Steelworkers' Trilogy*,[4] final and binding arbitration has been the preferred means to resolve labor disputes. In connection with this policy, this Court ruled in *Vaca v. Sipes*, 396 U.S. 171, 185 (1967), that an employee may be excused from exhausting those procedures before proceeding to court on a breach of contract claim if the Union breached its duty to represent him fairly or if the employer engaged in "conduct [which] . . . amounts to a repudiation of those contractual procedures." The *Vaca* court also held that an employee "has no absolute right to have his grievance arbitrated . . . and that a breach of duty of fair representation is not established merely by proof that the underlying grievance was meritorious. . . ." *Id.* at 194-195.

The decision of the Ninth Circuit Court of Appeals that the finality of a grievance procedure can be undermined where one of the parties to it lied during the investigation of the grievance causing the other to drop it has vast implications.

Innumerable arbitrations obviously involve sharply disputed factual issues. The investigation and processing of a grievance will involve interviewing the witnesses and ultimately will result in a decision whether the grievance ought to be processed any further. Judgments as to credibility

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[4] *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Emp. Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car. Corp.*, 363 U.S. 593 (1960).

necessarily will be made by the investigators and, if the grievance proceeds that far, by the Arbitrator.

That these judgments are entrusted to a *final and binding* arbitral process should hardly be open to question. *See generally* Elkouri & Elkouri, *How Arbitration Works*, p. 273 (3d ed. 1973). The result of the ruling of the Ninth Circuit Court of Appeals is that any time there are sharply disputed facts, with parties presenting differing versions of the critical events, the losing side *always* will have recourse to federal court claiming that the winner "lied" in its presentation, thereby subverting the process and permitting the court to review the merits of the grievance *de novo*. Safeway, of course, does not argue that every such case will be successful. However, each such case following the Ninth Circuit's ruling will be able to withstand early disposition, will necessarily require a trial on the merits (because there are sharply disputed facts; see Rule 56, Fed. R. Civ. P.), and will substantially burden the courts in a way never envisioned by Congress or by this Court when national labor policy was formulated and the narrow exceptions to the finality rule were drawn. As stated in Elkouri & Elkouri, "Arbitration is an avenue traveled by thousands, indeed millions, of industrial disputants." *Id.* at 797. As a result of the Ninth Circuit's decision, a dangerous new doctrine has been created for the reopening of arbitrable disputes after the arbitral process has run its course.

B. The Court of Appeals Holding that the Telling of a Lie During the Arbitral Process Constitutes a Repudiation Is in Conflict With the Law in Other Circuits and of This Court

There is no question that a repudiation of the arbitral process excuses a grievant from the finality of those procedures. *Vaca v. Sipes, supra.* The question in this case, how-

ever, is "What constitutes a repudiation?" Safeway respectfully submits that no court that ever has considered this issue has extended the doctrine as far as the Ninth Circuit Court of Appeals. Indeed, courts have rejected the proposition that employer conduct falling short of an outright refusal to proceed in accordance with the contract constitutes a repudiation sufficient to excuse the grievant from exhausting the contractual grievance procedures. *See e.g., Bettencourt v. Boston Edison Company,* 560 F.2d 1045, 1049 (1st Cir. 1977); *Boone v. Armstrong Cork Co.,* 384 F.2d 285, 292 (5th Cir. 1967); *Caruso v. Drake Motor Lines, Inc.,* 78 F.R.D. 586, 590 (E.D. Pa. 1978).

In *Rabalais v. Dresser Industries, Inc.,* 566 F.2d 518 (5th Cir. 1978), the employee alleged that his employer had repudiated the grievance procedure by its refusal to participate in it. While finding this allegation sufficient to withstand a dismissal, the Court found that it was not applicable in the case before it:

> The employer participated in the first three stages of the grievance process. At that point neither the employer nor the union sought the final step, arbitration. Rabalais argues that there was a repudiation because the employer did not consider the claim a proper subject of a grievance. *This argument, however, clearly confuses repudiation of the grievance procedure and a refusal to accept an employee's position with respect to a grievance. An employer can obviously take a stance contrary to that of the employee during the grievance process without being deemed to have repudiated that process.*

566 F.2d at 520.

Likewise, in *Robbins v. George W. Prescott Publishing Co., Inc.,* 457 F.Supp. 915 (D. Mass. 1978), *appeal dis-*

missed, 614 F.2d 3 (1st Cir. 1980), allegations of employer repudiation were made, including alleged refusal to rescind an improper discharge, bad faith use of the grievance procedure to precipitate the termination of the plaintiff, and lack of any intention on the part of the company to submit to the grievance procedure in good faith.

The district court held that these allegations "do not rise to [the level]" of repudiation (457 F.Supp. at 921):

> Analytically and temporally, acts by an employer which are alleged to be substantive breaches of a bargaining agreement . . . cannot also serve as anti-remedial acts constituting employer repudiation of the grievance and arbitration procedure established for the resolution of those earlier substantive breaches. . . . To hold otherwise would allow the repudiation exception to swallow whole the exhaustion requirement, since underlying substantive claims of breach of contract will always be at issue in § 301 cases. . . .
>
> Robbins' argument, which could be echoed by almost every § 301 plaintiff, that he is excused from resolving his claims through available contractual procedures because the Company has neither rescinded its actions, reinstated him, nor conceded that it has violated the contract, in no way establishes ignorance, obstruction or repudiation of the contract's remedial procedures by the Company. Those stances by the employer are simply consistent with the Company's position that Robbins was properly discharged.

In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 571, a case principally relied upon by both the district court and the Ninth Circuit Court of Appeals, this Court held that a grievant may not reopen his claim under Section 301 based on the alleged discovery of new evidence:

> Petitioners are not entitled to relitigate their discharge merely because they offer newly discovered

> evidence *that the charges against them were false and that in fact they were fired without cause.* The grievance process cannot be expected to be error-free.

Thus, Dogherra's contention that Martinez lied to her Union, even if true, is an insufficient ground for the Court to deny the force and effect of the decision of Arbitrator Kagel. In *Bridgeport Rolling Mills Company v. Brown*, 314 F.2d 885 (2d Cir. 1963), *cert. denied*, 375 U.S. 821 (1963), the Second Circuit Court of Appeals affirmed a judgment upholding an arbitrator's award despite the allegation that the grievant committed perjury during the arbitration hearing. The Court recognized that proof that the grievant perjured himself at the arbitration hearing does not imply that the award was procured by fraud. Thus, the Court denied the employer's effort to vacate the arbitration decision. In a *per curiam* decision, the Court stated:

> That the employer at the time his motion was presented to the District Court may have had, or may now have, sufficient evidence to justify a discharge of Brown for cause if he were now in the employer's employ is irrelevant to the issues the arbitrator heard and has no bearing upon the arbitrator's determination that the employer did not have just cause to discharge him in 1961.

314 F.2d at 885-886.*

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*The cases cited by the Ninth Circuit Court of Appeals in support of its conclusion that lying to Union investigators causing them to drop a grievance constitutes fraud and repudiation, *Shearson, Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 313 (7th Cir. 1981); *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Company*, 397 F.2d 594, 598 (3d Cir.) *cert. denied*, 393 U.S. 954 (1968); and *Karppinen v. Karl Kiefer Machine Co.*, 187 F.2d 32, 34-35 (2d Cir. 1951), at most hold that perjured testimony given during the arbitration hearing might be grounds for vacating an award. In the instant case, there was *no perjured testimony* given

Other Circuits have stopped short of applying the repudiation doctrine to conduct other than a refusal to participate in the process. The doctrine has been grossly extended in the instant case where a bargaining unit employee of Safeway, without knowledge of anybody else in the Company, took it upon himself to lie to his own Union during the investigation of a fellow member's grievance. That such conduct would be held to be *Safeway's* repudiation of the grievance procedure is contrary to established law in this Court and in other Circuits.

C. The Court of Appeals Finding That Martinez was Safeway's Agent Dangerously Intrudes on the Arbitral Process

In holding that Martinez' conduct properly was "chargeable to Safeway," notwithstanding the fact that Martinez was acting alone and on a subjective belief that he was helping attain the Company's alleged goal of eliminating Dogherra as its employee (a belief utterly unsubstantiated by the evidence), the Court of Appeals created a doctrine which dangerously erodes the finality of the grievance and arbitration process. The Court improperly applied common law agency principles without reference to the competing concerns of national labor policy.

Dogherra had the burden of proving agency as it related to the processing of grievances. In the absence of any evidence that Safeway authorized Martinez to process grievances, knew that Martinez was lying or caused him to do so, it is improper to impute Martinez' conduct to the Company.

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by Martinez during the arbitration hearing, at which he did not testify. The remedy for such fraud is a reopening of the arbitration, something which Dogherra never has sought.

The Court of Appeals' conclusions as to agency should have been tempered by the holdings of this Court in *Hines* and *Vaca* and by the sound reasoning of other Courts of Appeals as to what *conduct* on the part of one of the *parties* constitutes a repudiation of the grievance and arbitration procedure. If, as held in the cases cited in the immediately preceding section, a repudiation requires some conduct which constitutes a rejection of the process, how can Martinez' behavior, which involved no conduct on the part of Safeway, but only at worst *his* subjective and unsubstantiated evaluation of the Company's desires, be imputed to the Company for purposes of finding that *it* repudiated the grievance process?

As demonstrated in *Vaca* and the other Circuit Court decisions following it, the repudiation doctrine was designed to be narrow in scope. It was not designed to permit the conduct of an employee of a company, albeit one in the bargaining unit, to bind that company when such conduct was not known to it, ratified by it, or caused by it.

Until this case, there has been no reported decision where anything other than overt conduct on the part of the repudiating party has been imputed to it for purposes of finding that a repudiation of the grievance procedure has occurred. The Ninth Circuit Court of Appeals has departed from this standard, and it is appropriate for this Court to resolve this conflict.

CONCLUSION

In the Article Adomeit, *"Hines v. Anchor Motor Freight:* Another Step In The Seemingly Inexorable March Towards Converting Federal Judges (And Juries) Into Labor Arbi-

trators Of Last Resort," 9 Conn. L. Rev. 627, 648 (1977), the commentator states:

> The price of perfect justice is high, and if the courts want to redetermine the guilt of persons discharged for alleged wrongdoing and found to be in the wrong by arbitrators, then discharge arbitration will no longer be final and binding.

The Ninth Circuit Court of Appeals, in effect, vacated Arbitrator Kagel's decision even though no one lied at the arbitration hearing and only witnesses for the Union testified. As a result of the Court of Appeals decision, the mere allegation in a complaint that one of the parties (or indeed an unknown agent of one of the parties) lied during the investigation of a grievance will be sufficient to invoke the power of the federal courts. The dispute, whether or not there was a lie, necessarily will be immune from dismissal and summary judgment. The Court of Appeals' decision, therefore, creates a dangerous doctrine of judicial intrusion into the arbitral process. In addition, it is contrary to established law of this Court and in other Circuits.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(Appendices Follow)